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BRIEF FOR THE PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 30.

DANTAN GEORGE REA, PETITIONER,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 14) is reported at 218 F. 2d 237. The opinion of the District Court (R. 8) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 19). The petition for a writ of certiorari was filed on January 19, 1955. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment (in pertinent part):

No person * * * shall be compelled in any Criminal Case to be a witness against himself, * * *

28 U. S. C. 1952 ed., Sec. 2463:

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Internal Revenue Code of 1939:

Sec. 2590. *Tax.*

(a) *Rate.* There shall be levied, collected, and paid upon all transfers of marahuana which are required by Sec. 2591 to be carried out in pursuance of writ n order forms taxes at the following rates:

* * * * *

(2) *Transfers to others.* Upon each transfer to any person who has not paid the special tax and registered under Sec. 3230 and Sec. 3231, $100 per ounce of marahuana or fraction thereof.

(b) *By whom paid.* Such tax shall be paid by the transferee at the time of securing such order form

and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section * * *.

(26 U. S. C. 1952 ed., Sec. 2590)

Sec. 2593. *Unlawful possession.*

(a) *Persons in general.* It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Sec. 2590 (a) to acquire or otherwise obtain any marahuana without having paid such tax: * * *.

(26 U. S. C. 1952 ed., Sec. 2593)

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 1. *Scope.*

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 41. *Search and Seizure.*

* * * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is unsufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued,

or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

QUESTIONS PRESENTED

1. Whether a federal court should enjoin a federal officer from testifying in a state criminal trial regarding evidence which he had illegally seized under an invalid search warrant issuing out of said court, and which had been suppressed by the federal court as seized in violation of the Fourth Amendment?

2. Whether a federal court should enjoin federal officers from transferring possession of such evidence to state prosecuting officers?

STATEMENT

On September 12, 1953, an indictment was returned in the United States District Court of the District of New Mexico charging petitioner with having acquired marahuana, on August 13, 1953, without having paid the transfer tax required by law, in violation of 26 U. S. C. 2593 (a), 1939 Internal Revenue Code (R. 2). Following a plea of not guilty (R. 2-3), petitioner moved to quash the search warrant issued by the United States Commissioner to narcotics agent Salter, and to suppress "as evidence

against him in any criminal proceeding", including the pending action, all property taken from petitioner's Albuquerque home by narcotics agent Salter pursuant to the search warrant (R. 3). The grounds petitioner relied upon for the suppression were that the search and seizure "was in violation of his rights under the Fourth Amendment" (R. 4.) After hearing, the District Court granted the motion to quash and suppress, and, on the Government's motion, dismissed the indictment (R. 4-5).

Immediately thereafter, and ten months subsequent to the illegal search and seizure itself, the narcotics agent went before a Justice of the Peace of New Mexico, made an affidavit that petitioner had been in possession of marahuana on August 13, 1953, and procured the issuance of a warrant for petitioner's arrest for possession of marahuana in violation of Section 71-636, N. M. Stat. Anno., 1941 Compilation (R. 7, 11). On the basis of this complaint, petitioner was arrested and is now awaiting trial by the State of New Mexico (R. 7).

On June 21, 1954, the petitioner moved that (1) an order issue and be served upon the narcotics agent to show cause why he should not be held in contempt for violating the order of suppression, (2) an order issue to restrain narcotics agent Salter from testifying about the existence, character, possession of, or facts about the suppressed evidence in state court, and (3) an order issue to enjoin the transfer of the physical evidence that had been suppressed out of the legal custody of the United States (R. 5). The motion requested such further relief as was necessary to protect petitioner's Constitutional rights and to enforce the previous order of the District Court suppressing the evidence (R. 6).

At a hearing on the matter, at which the narcotics agent and the United States Attorney appeared, it was

stipulated that narcotics agent Salter was "about to prosecute for the same offense, in the State Court with the same evidence", which had not yet been transferred to the State of New Mexico (R. 11). His testimony is essential to the state prosecution for the reason that only the agent can identify the evidence that was transferred to the government chemist (R. 12). The District Court denied the motion in its entirety and purported to limit its previous order of suppression of the evidence to "its use in the United States District Court for the District of New Mexico" (R. 8-9). Its unreported opinion held that (R. 8):

> "* * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court, and does not govern the use of that evidence in a State Court".

On appeal, the United States Court of Appeals affirmed the order (R. 19).

SUMMARY OF ARGUMENT

I

The prohibition against the use of illegally obtained evidence is imposed by the Constitution itself, and not merely by the courts as a rule of evidence. The right to have evidence returned or suppressed is an essential ingredient of the constitutional guarantee against unreasonable searches and seizures, without which the Fourth Amendment is a dead letter. Denial of *any* use whatsoever from illegally obtained evidence has been held by this Court to be the only effective means of enforcing the provisions of the Fourth Amendment and discouraging federal officers from violating rights guaranteed by this

amendment. If such evidence may be used in state courts, then a large portion of the sanction will be removed that now deters federal officers from illegal searches and seizures.

The argument that the only use prohibited is the receipt in evidence in a federal criminal trial is based on the false premise that the Fourth Amendment only guards against an unreasonable search and seizure that results in self-incrimination, whereas the Fourth Amendment protects against such illegal invasions for all purposes. It is not limited to a situation where the Government seeks to incriminate one, but protects the aggrieved person in civil trials and in state courts as well.

A state court, as well as a federal court, is obliged to ban the admission of evidence obtained by the Federal Government in defiance of the Fourth Amendment. This is because the Constitution is the Supreme Law of the land, equally binding on state courts. Suppression being an essential part of the constitutional right, it is a remedy available in a state trial.

The fact that a federal court may receive evidence seized in violation of the state constitution is immaterial, since in such case there has been no violation of the federal constitution.

II

When an illegal search and seizure is perpetrated by virtue of an invalid warrant, issued by a United States Commissioner, the court whose process has been abused should correct the wrong by quashing the warrant and restoring the *status quo*. This is simply the exercise of its inherent authority to control its own process, and the officers who carry out such process.

Even if a state court, if it succeeded in obtaining evidence from the control of the federal court, might validly use such evidence to convict, the federal court still has an obligation not to make such evidence available. This is analogous to the duty of the Federal Bureau of Investigation to refuse to produce confidential reports in state courts, despite the fact that, if illegally produced, they could be received in evidence.

III

The action of the United States, through its courts and agents, in supplying evidence for a state prosecution that was obtained by an illegal search and seizure, constitutes compulsory self-incrimination. While this may not violate the Fifth Amendment, because the incrimination is under the laws of a different sovereign, still the activity of the national government in compelling incrimination before a state government is not a delegated power, and is therefore in excess of its constitutional powers. Nor does the incrimination result incidentally from the exercise of a constitutional power, such as the power to tax. It cannot therefore be justified as a legitimate power of the federal government.

IV

The suppression of evidence in the custody of the Federal Government is not an interference with state prosecuting authorities. The evidence is already in federal control, and the injunction sought will not operate in any way on state officials.

In addition, the state prosecution will no more be frustrated in this case than in the ordinary instance of returning non-contraband evidence, which also deprives the state courts of its use. Where property is returned and suppressed, there is no right of a state to intervene and

defeat the privilege of the victim to obtain a restoration of his property, since the remedies of the Fourth Amendment are not subject to a state's prior right to demand illegally obtained evidence.

V

The original order of the trial court suppressed the evidence in any criminal proceeding, including but not limited to the pending case. As it became *res judicata*, the district court was powerless to amend the final order by a later order.

Under Rule 41 (e), Federal Rules of Criminal Procedure, the suppression relates to "any hearing or trial". This language is all inclusive, and is intended to be as comprehensive as the constitutional remedy itself.

ARGUMENT

I:

The Fourth Amendment Bars the Admission of Evidence Obtained by an Illegal Search and Seizure of the Federal Government in State, as Well as in Federal, Prosecutions.

A. *The Return and/or Absolute Suppression of Evidence Obtained by a Violation of the Fourth Amendment Is a Rule Imposed by the Constitution, and Not Merely a Judicially Created Rule of Evidence Applicable Solely in Federal Courts.*

Is the admission of evidence obtained by an illegal search and seizure forbidden by the Fourth Amendment itself? This is the issue squarely tendered. It was recognized as such by the Court of Appeals, which flatly held that "The receipt of evidence in trials in federal courts,

resulting from unlawful searches and seizures by federal officers or agents, is not a violation of rights guaranteed by the Fourth Amendment." (R. 16). If the Constitution would permit conviction in federal courts on evidence thus secured, the Court of Appeals reasoned that it would allow use of such evidence in state courts. In this view, the exclusion is merely a judicially created rule of evidence, no more inviolable than the rule of *McNabb v. United States*, 318 U. S. 332, 341. Since the Constitution would not render such evidence inadmissible in federal courts, the conclusion is reached that neither does it bar state courts from using the same evidence.

Although this Court has not decided the precise point at issue, the language of many of its decisions strongly suggests that the exclusionary rule is an essential and inseparable part of the constitutional right itself.

In *Weeks v. United States*, 232 U. S. 383, 393, a unanimous Court expressed that view that, if the fruit of an unconstitutional search and seizure could be admitted in evidence against a defendant; then "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution". Elsewhere in the opinion (at page 394), it was declared that "to sanction such proceedings [i.e., the illegal search and seizure] would be to affirm by judicial decision a manifest if not open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action". Nowhere in this historic decision is there any intimation that the Constitution would allow the admission of the evidence which the Court there outlawed; or that the Court was itself creating the prohibition.

In writing the opinion of this Court in *Wolf v. Colo-*

rado, 338 U. S. 25, Mr. Justice Frankfurter certainly construed the holding of the *Weeks* case as going beyond a judicially created rule of evidence, and as being a constitutional prohibition. At page 28 the following was said:

> In *Weeks v. United States*, *supra*, this Court held that in a federal prosecution *the Fourth Amendment barred the use* of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial *implication*. Since then it has been frequently applied and we stoutly adhere to it. (Emphasis added.)

In the same opinion, it was also said, at page 33, that "we have interpreted the Fourth Amendment to forbid the admission of such evidence". The dissenting members of the Court in *Wolf v. Colorado*, *supra*, emphatically agreed that the outlawry of such evidence is constitutional in origin.[1]

In commenting upon the consequences of permitting an indirect use of illegally seized evidence, Mr. Justice Holmes was equally forceful in *Silverthorne Lumber Company v. United States*, 251 U. S. 385. It would, he held,

[1]Mr. Justice Douglas said (p. 40): "I agree with MR. JUSTICE MURPHY that evidence obtained in violation of it [the Fourth Amendment] **must** be excluded in state prosecutions as well as in federal prosecutions, since in absence of that rule of evidence the Amendment would have no effective sanction". Mr. Justice Murphy, joined by Mr. Justice Rutledge, declared (p. 41): "For there is but one alternative to the rule of exclusion. That is no sanction at all", and (p. 44) "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtaining evidence". Mr. Justice Rutledge expressed the same opinion in these words (p. 48): "The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established".

reduce "the Fourth Amendment to a form of words". *Silverthorne Lumber Company v. United States, supra*, p. 392.

Construing the ruling of *Gouled v. United States*,[2] 255 U. S. 298, this Court declared in *Olmstead v. United States*, 277 U. S. 438, with respect to a paper stealthily extracted from the defendant's office by a federal agent, that "admission of the paper was considered a violation of the Fourth Amendment".

The clear implication of the Court's language in the quoted cases is that the right without the remedy is worthless.[3] The remedy must therefore be an inherent part of the constitutional privilege against an illegal federal search and seizure.

The rationale of the exclusionary rule is simple: to permit the evidentiary use of evidence illegally secured by the Federal Government will encourage federal agents to violate the Fourth Amendment, and, at the same time, place the victim for all practical purposes in the same position as if the Fourth Amendment did not exist. Conversely, to deny the evidentiary use of such evidence will,

[2] In answering the contention of the Government in **Gouled v. United States**, supra, that a court ought not to stop during a trial to inquire into the means by which evidence was obtained, this Court said (at p. 313): "A rule of practice must not be allowed for any technical reason to prevail over a **constitutional right.**" (Emphasis added.)

[3] This view finds expression in many state cases on the subject. See, for example, **State v. Sheridan**, 121 Iowa 164, 168, 96 N. W. 730, 731 ("To so hold is to emasculate the constitutional guaranty, and deprive it of all beneficial force and effect in preventing unreasonable searches and seizures"); **Youman v. Commonwealth**, 189 Ky. 152, 166, 224 S.W. 860, 866 ("It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. * * * it is better for the public good that this should happen than that a great constitutional mandate should be nullified".) **Tucker v. State**, 128 Miss. 211, 223, 90 So. 845, 848. ("But we decline to follow those cases. In our judgment they in a large measure strike down the liberties intended to be secured by the constitutional guaranties—their view we think is too narrow".)

discourage federal agents from violating the Fourth Amendment because nothing can be accomplished thereby, and it will leave the victim no worse off than if the wrong had not be perpetrated. So viewed, the traditional remedy is as broad as the constitutional right, for it restores the *status quo* prevailing before the search and seizure and thereby deters federal agents from attempting to distrib this *status quo*.

The decision of the lower court would narrowly circumscribe this remedy and, to that extent, impair the constitutional right itself. In effect, federal agents would be told that the sole place that evidence illegally seized may not be used is in a federal criminal trial. Thus, there is a direct incentive on the part of federal agents to treat with indifference, if not to outright hostility, rights under the Fourth Amendment, secure in the knowledge that, if the evidence cannot be admitted in a federal prosecution, then it can be received in a state trial. Thi is a new, and heretofore unheard of, bonus for lawlessness by federal law enforcement officers.

The incentive to federal agents to invade the constitutional right in question, with the consequent peril to such right, is neither fanciful nor insubstantial. This very real danger springs from the existence of a vast area where federal and state p nal laws overlap, and where law enforcement officers of both closely cooperate. Thus, evidence establishing the following federal offenses would tend to establish a state crime as well: assault on a federal officer, embezzlement of property of bankrupt estate, uttering counterfeit, filing false election expenditures, theft from an F.D.I.C. bank, extortion, blackmail, flight to avoid prosecution, gambling without federal stamp, murder of federal officer, kidnaping, liquor violations, narcotic violations, transportation of lottery tickets, mail fraud,

prostitution near a military establishment, mailing obscene matter, transportation of dentures, income tax evasion, racketeering, wrecking trains, White Slave traffic, interstate transportation of stolen property, receipt of stolen goods, and National Bank robbery. These are but a few in the catalog of offenses where jurisdictions overlap.

From the viewpoint of the potential victim, he would be in constant jeopardy of an invasion of his home, and, thereafter, of a state prosecution made possible solely through the instrumentality of the federal authorities. Thus, there would be no restoration of his *status quo*. So far as the victim is concerned, who is thus brought to face a state prosecution, the protection of the Fourth Amendment against invasion of his home by the *Federal Government* "is of no value", and it "might as well be stricken from the Constitution." *Weeks v. U. S. supra*, 393.

In short, the only effective method of enforcing the constitutional guaranty against the Executive Branch of the Federal Government is to remove *all* incentive to invade constitutional rights, not a portion only. If the right against illegal search and seizure by federal authority is entitled to protection by a rule of exclusion, it is entitled to 100% protection. There is no basis in reason or in the Constitution for applying half a remedy, that is, discouraging illegal federal searches and seizures by suppressing the evidence in a federal court and encouraging such activity by admitting the same evidence in a state court, when the Constitution is the supreme law of the land in both tribunals. Art. VI, Constitution.

Considered in a different light, the issue is whether the protection against illegal search and seizure is available only when, and to the extent that, the evidence is sought to be employed to incriminate the victim in a federal pros-

cution, contrary to the Fifth Amendment. It is, of course, true that for the Federal Government to employ such evidence in a federal court would violate the Fifth Amendment.[1] It hardly follows, however, that the evidence may be used for every purpose except to violate the Fifth Amendment. This would strip the Fourth Amendment of any independent vitality. The person and home of every person would be subject to the ravages of federal power without limit, save only that the fruits of the seizure could not be made the basis of federal prosecution. Petitioner submits that such a qualification of the Fourth Amendment is without precedent, that the sweep of the Fourth Amendment is broader than the Fifth, and that it casts its enveloping shadow over *every* use whatsoever, whether in federal court or not, of evidence secured in defiance of the Fourth Amendment.

The case of *Go-Bart Importing Company v. United States*, 282 U. S. 344, illustrates the principle that the remedies afforded by the Fourth Amendment in the form of return and suppression are independent of the Fifth Amendment. One of the petitioners there was a corporation, and, as a corporation, possessed no right to invoke a claim against self-incrimination under the Fifth Amendment. *Hale v. Henkel*, 201 U. S. 43, 75; *Baltimore & Ohio R.R. v. Int. Com. Comm.*, 221 U. S. 612, 622. The corporate petitioner was not named in any criminal proceeding. This Court nevertheless remanded the case to the District

[1] **See Gouled v. United States**, 255 U. S. 298, in which it was said (at p. 311):

> The fourth question reads: "If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime of which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?".
>
> The same papers being involved, the answer to this question must be in the affirmative for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be in effect, as ruled in the **Boyd Case**, to compel the defendant to become a witness against himself.

Court with direction "to enjoin the United States attorney and the special agent in charge from using the papers as evidence and to order the same returned to the petitioners".

The ruling in *Silverthorne Lumber Company v. United States, supra*, rests squarely on the Fourth Amendment, and is completely divorced from self-incrimination. There also the corporate defendant could not have relied upon a claim of incrimination. Nevertheless, this Court, speaking through Mr. Justice Holmes, condemned *any* use of the evidence in these words (p. 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but* that *it shall not be used at all.* (Emphasis added.)

Thus the availability of the remedies of suppression and return to a corporation demonstrates that the Fourth Amendment is not a mere handmaiden of the Fifth, that its protection is not defined in terms of incrimination in a federal court.

Additional proof of this point may be found in the fact that the exclusionary rule applies to civil cases. *Rogers v. United States*, 97 F. 2d 691 (C.A. 1st); *United States v. Physic*, 175 F. 2d 338 (C.A. 2d). Again, if the redress of return and suppression were dependent in some way upon the intended use by the United States of the evidence for incrimination, and if it were simply a means of forestalling such a use in advance of prosecution, then logically the return and suppression ought to be granted only upon a showing of intended prosecution. Yet, this is not true: property will be returned before prosecution is commenced. *Steele v. United States*, No. 1, 267 U. S. 498; *Go-Bart Company v. United States, supra*; *Burdeau*

v. McDowell, 256 U. S. 465; *Perlman v. United States*, 247 U. S. 7, when no prosecution is pending before the court asked to return the evidence, and when such court *could not* therefore be ruling on the admissibility of evidence, to be offered before it in trial, *Weinberg v. United States*, 126 F. 2d 1004 (C.A. 2d), and after the prosecution has terminated, *Dickhart v. United States*, 57 App. D. C. 5, 16 F. 2d 345.

That the fruit of an illegal seizure might be frozen in the hands of the offending government for all purposes, and not merely a pending prosecution, seems to be conceded in *United States v. Wallace & Tiernan Company*, 336 U. S. 793, 822. The issue there was not whether an "order of general outlawry" as to such evidence could be validly be issued, and whether "the scope of relief in such a case [suppression] may extend far beyond its effect on a pending trial". Rather, granting that a suppression *could* have this effect, this Court was concerned entirely with whether the particular order *did* have such an effect.

If, as appears from the foregoing cases,[3] the Fourth Amendment is in no way qualified by the Fifth Amendment prohibition against using evidence in federal court for incriminating purposes, then no reason exists for limiting the protection of the Fourth Amendment to the

[3]See **District of Colombia v. Little**, 85 U. S. App. D. C. 242, 245, 178 F. 2d 13, 16, affirmed (on other grounds) 339 U. S. 1, in which such a qualification upon the Fourth Amendment was urged by the Government, and rejected by the Court in these words (at p. 245-246):

> The argument is wholly without merit, preposterous in fact. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. * * *
>
> ***To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon.

use by the Federal Government of the evidence in its own courts.

B. *The Constitutional Prohibition on the Admission of Evidence Illegally Seized by the Federal Government is Applicable to State Courts.*

If, then, evidence illegally seized by the United States is infected with a constitutional taint, is a state court as well as a federal court obliged to ban its admission? Of necessity, the answer must depend upon what law is paramount in a state court in admitting or excluding evidence. Petitioner submits that the Constitution, being equally the supreme law of the land in state courts and federal courts, demands that state courts exclude evidence admittedly obtained by a violation of the Constitution. See Art. VI, Constitution.

In *State v. Rebasti*, 306 Mo. 336, 267 S. W. 858, the Supreme Court of Missouri considered the admissibility in state courts of evidence illegally seized by federal officers. The latter had obtained a search warrant on the grounds that the affiant believed the safe deposit box in question was being "rented, used and controlled by Charles Rebasti for the unlawful sale and concealment of narcotic drugs". Admittedly the warrant issued by the United States Commissioner was invalid. In the presence of the bank's vice-president, the federal agents opened the box and discovered currency traceable to a robbery. At the trial for robbery the vice-president testified as to the presence of the money in defendant's safe deposit box, despite defendant's previous motion to suppress before trial.

On appeal from conviction, it was held that the motion was properly denied so far as the Missouri Constitution was involved, since the Missouri Constitution did not con-

rol the activity of federal officers, but only state officers. Referring to the claimed violation of the Federal Constitution, however, the Court said (pp. 346, 347):

> A different question is presented when we consider the claim that the production of evidence obtained was in violation of the defendant's rights under the Federal Constitution. State courts are as much under obligation to protect the rights of defendant guaranteed him by the United States Constitution as those guaranteed him by the Constitution of the State, . . .
>
> It is contended that because this case arises in a state court, and not in a federal court, this court cannot take notice of the restriction of the Fourth and Fifth Amendments to the Federal Constitution.
>
> It is unthinkable that a state court is powerless to protect the constitutional rights of its citizens, guaranteed by the Federal Constitution. To hold the evidence of the federal agents admissible in this case is to pronounce that doctrine. It is to say that the act of an officer, or of any other individual, is lawful or unlawful, not on account of the character of the act, but on account of the court in which it is called in question.

The opinion in the *Rebasti* case, *supra*, also disposes of the respondent's inference that, since the rule of suppression in federal courts does not apply to evidence wrongfully seized by state officers without federal participation, so evidence need not be excluded in state courts where illegally taken by federal agents without state participation.* At page 347 of *State v. Rebasti*, *supra*, the

*This reasoning appears in the respondent's Brief in Opposition to Petition for Certiorari (pp. 6-7), where dictum in **Byars v. United States**, 273 U. S. 28 is cited.

basis appears for allowing state officers to testify in federal courts on matters discovered by them in an illegal search:

> The restrictions of the Fourth and Fifth Amendments to the Federal Constitution apply only to federal officers. The like restrictions in a State Constitution apply only to state officers. When a case arises in a federal court and a state officer, as a witness, is asked to give evidence discovered by him in an unreasonable search and the provisions of the Federal Constitution are invoked in objection to his testimony, the court always holds that he may testify because the restrictions of the Federal Constitution do not apply to him.
>
> Likewise, in a state court, when a federal official is offered as a witness and is asked to testify to some facts which he discovered by an unreasonable search, and the State Constitution is cited in objection, his evidence is held competent because the restrictions of the State Constitution do not apply to him. But when a federal officer is offered as a witness in a state court, and his evidence is objected to because discovered in violation of the Federal Constitution, no case is cited where it is held admissible.
>
> Such constitutional restrictions of federal officers and state officers always apply wherever they are called in question.
>
> Suppose a federal officer should make an unreasonable search, and in doing so outrage the citizen's rights under the United States Constitution. Can it be said that the unlawful act of the officer could become lawful because of the court in which it is questioned? Suppose the injured citizen should sue him in the state courts for damage done in violation of

his constitutional rights, and the officer in defense should plead that, although he acted unlawfully, the plaintiff had no right to prove it in a state court. Does anyone suppose the plea would be good?

In this case, the federal officer violated the constitutional rights of the defendant, and violated the constitutional restrictions upon his own behavior as a federal officer. Had the case been pending in the federal court he could not have testified, because his act in procuring his information was *unlawful*. His case, however, is pending in the state court and it is contended that he may testify because his act was *lawful*. By that theory, his act becomes lawful or unlawful, not because of its quality, but because of the court which decides the question. He can bring his misdemeanor to a state court and there have his lawless disregard of his official duty appraised as a meritorious performance.

Numerous cases are cited in support of the opposite view, where it is said that the amendments to the Federal Constitution are intended to limit the power of the *national government* alone and do not affect the powers of the *state governments*. This is construed by the prosecution to mean that the restrictions of the national government do not affect state courts. But the cases cited do not so hold. Where the opinions in such cases hold that the Fourth and Fifth Amendments to the Federal Constitution operate upon the federal government only and not upon the state government, they mean, of course, the agents of the federal government. If those amendments are intended to restrain the actions of federal officers, why should it ever be held that under certain conditions they do not restrain them?

The case of *People v. Adams*, 176 N. Y. 351 68 N. E. 636, is cited, where it is said that the Fourth and Fifth Amendments to the Constitution of the United States do not apply to *actions in the state courts*. That statement is purely *obiter*. The facts in the case do not warrant any such statement of the law. In no case has it ever been held, so far as I can discover, that the unlawful act of a federal officer becomes lawful when brought into question in a state court, or that the evidence of a federal official, which would be held incompetent in a federal court on account of the restrictions of the Fourth and Fifth Amendments, becomes competent when offered in a state court.

Thus, a federal court might receive evidence illegally seized by state officers without federal participation simply because there has been no violation of the Fourth Amendment. See *Byars v. United States*, 273 U. S. 28, 33. A state constitutional provision is not the supreme law of the land for a federal court. But the converse is not true. When there is offered in a state court evidence illegally seized by federal agents, even though the state constitution has not been violated, the federal constitution has. And the federal constitution is entitled to the same recognition in the state court as in the federal. "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." *Mooney v. Holohan*, 294 U. S. 103, 113; *Robb v. Connolly*, 111 U.S. 624.

There can be no doubt that the federal constitution is adequate to reach and suppress evidence in a state court. If, in order to obtain information, Congress must cloak with immunity evidence given before a congressional committee, there exists the requisite constitutional power

to do so. *Adams v. Maryland*, 347 U. S. 179; *Brown v. Walker*, 161 U. S. 591, 606. *A pari*, if the guarantees of the Fourth Amendment demand a suppression of evidence in order to protect one's home from federal invasion, the Constitution can affect state as well as federal proceedings.

State v. Arregui, 44 Idaho 43, 254 Pac. 788, involving a suppression of evidence secured by a federal prohibition officer pursuant to a warrant issued by the United States Commission on hearsay evidence. There the Court said (at p. 67):

> In the hands of the state courts is placed the power to prevent in part the violation of the rights of a citizen by federal authorities in violation of state and federal constitutions. This is not only in the power of the state court, but its duty. If, as said in the Burdeau case, the Fourth Amendment to the federal constitution "was intended as a restraint upon the activities of sovereign authority, * * * governmental agencies," and in the Byars case, "the assurance against any revival of" the "misuse of power in the matter of searches and seizures," embodied in the Fourth Amendment, "is not to be impaired by judicial sanction of equivocal methods * * * which, in reality, strike at the substance of the constitutional right," and as the same intention prompted the adoption of the provisions of our state constitution "to secure the people against unauthorized official action," there seems no other logical conclusion than that unauthorized official action should not receive judicial sanction by receipt of evidence in a state court, although secured by Federal officers, which, upon the same showing of facts, would be denied in a federal court, when to do so would be to violate the same

right guaranteed by both the federal and state constitutions.

See also *State v. Hiteshaw*, 42 Wyo. 147, 153-154, 292 Pac. 2; *Walters v. Commonwealth* 199 Ky. 182, 250 S. W. 839; *Little v. State*, 171 Miss. 818, 159 So. 103. *Contra*: *State v. Gardner*, 77 Mont. 8, 249 Pac. 574; *Terrano v. State*, 59 Nev. 247, 91 P. 2d 67; *Comm. of Pa. v. Colpo*, 98 Pa. Superior Court 460, certiorari denied, 282 U. S. 863. The opposing authorities cited do not consider the distinction between a federal court's not being bound by state law and a state court's being obliged to recognize federal constitutional rights as paramount over any state rights in conflict therewith. To that extent such authorities are of little value.

While respondent finds comfort for its position in *Wolf v. Colorado*, 338 U. S. 25, 33, the fact is that the Wolf case is exclusively concerned with what remedies the Fourteenth Amendment demands of the states in dealing with illegal searches by state officers: its holding does not touch on the problem of what the Fourth Amendment requires as an effective means of protecting one against an invasion of his home by federal officers. The opinion in the *Wolf* case takes pains to distinguish between the deterrents that exist against state officials and federal officials, with the consequent need for the stronger remedy, namely, suppression, where federal officers are concerned.[7] Thus, the effect of the Wolf case is to leave unimpaired the traditional remedy of suppression in Fourth Amendment cases.

[7] "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsobile to the community itself than local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." **Wolf v. Colorado, supra**, at pp. 32-33.

II

The District Court Was Obliged to Redress the Constitutional Wrong Done to the Petitioner by an Abuse of the Court's Own Process.

Reduced to its elements, this case involves a refusal of the District Court to undo a wrong initiated by an inferior officer of the Court in issuing an invalid warrant and continued by a federal agent's exerting judicial power in executing the invalid warrant. This is not a case where the Court is being asked to extend the arm of judicial power over a government agent acting independently of the Court. From start to finish, the wrong is a judicial wrong, which should be remedied by the Court in which it occurred.

The illegal warrant was process of the Court. In issuing the warrant, the United States Commissioner acted as "an inferior officer" of the District Court. *Go-Bart v. United States*, *supra*, 352; *United States v. Allred*, 155 U. S. 591, 594. The initial error was as much an error of the Court as if the district judge himself had authorized the warrant. Thus, the District Court had jurisdiction to quash the warrant, Rule 41 (e), Rules of Criminal Procedure, and nip the error in the bud. Undoubtedly it would have done so in advance of its execution if petitioner had had time to move to quash the warrant. Petitioner submits that he should be in no greater jeopardy merely because the federal officers were so diligent in executing the illegal process that petitioner could not get into federal court in time to quash the warrant. To so rule would make the protection of the Fourth Amendment the prize in a race of diligence between an intended victim of an invalid warrant and federal officers: only if the victim could get into court fast enough would he enjoy the full protection of the Fourth Amendment. This, of course,

would reward law enforcement officers for the speed with which they could execute illegal process.

Again, the warrant is returnable to the court and the property seized is placed by statute "*in custodia legis*, and subject only to the orders and decrees of the courts of the United States." 28 U.S.C. 1952 ed., Sec. 2463. Thus the disposition of the evidence remains entirely within the province of the court.

Even if there is no constitutional right on the part of the petitioner to have the evidence suppressed, the Court should have done so as an exercise of its inherent authority and duty to correct the abuse of its process.[8] In a similar situation in *Wise v. Henkel*, 220 U. S. 556, where the trial court had ordered the United States Attorney to return papers seized pursuant to the court's warrant, this Court held (at p. 558):

> * * * the authority of the Court to consider and decide the application for the return of the books and papers existed wholly irrespective of whether there was a constitutional right to exact the return of the books and papers. That is to say, it was within the power of the Court to take jurisdiction of the subject of the return, and pass upon it, as the result of its *inherent authority to consider and decide questions arising before it concerning an alleged unreasonable*

[8] See **United States v. Specified Quantities of Intoxicating Liquors**, 7 F. 2d 835 (C.A. 2d), where liquor seized under an illegal warrant was ordered returned (p. 836):

> It is enough to hold as we do, that, either at law or in admiralty, the validity of an attachment or propriety of a seizure in rem can always be raised by a motion to vacate. The practice is elementary. Therefore it was proper to move to vacate this seizure. Ordinarily a sheriff or United States Marshal does not require to be specially told to whom he shall restore possession of what he improperly seized, but, as the marshall had received the goods from the prohibition agents, it was well to tell him where they should go, for the authority of the agents to have the goods at all had been destroyed by the violation of search warrant by the United States Commissioner.

exertion of the process of the Court. (Emphasis added).

For the trial court to quash the warrant, but allow those who executed it to make use of what was obtained through its use, would be to sanction and encourage the abuse of its judicial process. To argue, as the respondent does, that New Mexico might constitutionally convict the petitioner if it obtained this evidence, is no answer. A court ought to remedy an abuse of its process without respect to the fact that, by failing to do so, it could enable the State of New Mexico directly to profit from the abuse. Thus, the admissibility or non-admissibility of the evidence in a state court, does not diminish one whit the inherent obligation of a federal court to correct the abuse of its process.

Respondent seems to argue that, simply because the State of New Mexico could use the evidence to obtain a conviction (relying on *Wolf v. Colorado, supra*), the federal district court has no obligation to retain the evidence. This is a *non sequitur*. It might well be that the United States has an obligation under the Constitution to return and suppress evidence which, if a state by some means, legal or not, could get hold of, it might use for a conviction.

In *Boske v. Comingore*, 177 U. S. 459, for example, the Collector of Internal Revenue had an obligation, immediately imposed by regulation and ultimately by the Constitution, not to make certain records available to a Kentucky court for the use of the State of Kentucky as plaintiff. It might well be that, had Kentucky somehow obtained the records, the proceedings in the Kentucky court would not be invalid. Nevertheless, the Collector who threatened to surrender possession of the records would be restrained by a federal court from doing so. In

short, an obligation on the part of the federal agent to retain certain evidence, physical and otherwise, is in no way impaired by the ability of a state court to use the evidence if it could obtain it. See also *United States ex rel. Touhy v. Ragen*, 340 U. S. 462.

To the extent that petitioner is attempting to enforce against the Federal Government an obligation not to transfer evidence, it is necessary that he invoke the power of the district court. By waiting to be convicted in a state court, the matter would be rendered moot since the federal agent would already have acted and thus rendered the matter moot. Futhermore, barring exceptional circumstances, resort to federal court may be had without first exhausting the judicial remedies of state court. *Lane v. Wilson*, 307 U. S. 268, 274.

III

The Threatened Action of United States Agents to Supply the Means of Conviction in a State Court Should be Restrained as in Excess of the Constitutional Powers of the Government.

The United States is a government of delegated powers, and those powers not granted expressly or by reasonably implication, are "prohibited". *United States v. Butler*, 297 U. S. 1. Where in the Constitution is the Federal Government given the authority to ferret out and supply evidence solely for the benefit of state prosecutions? That, in effect, is what the Government is in the process of doing, there being no question of prosecution now under federal law.

If the United States used the evidence in its own courts, it would be compelling a defendant to become a witness against himself, in violation of the Fifth Amendment. *Gouled v. United States*, 255 U. S. 2[illegible], 311. If it

is the instrumentality of supplying the evidence for a state prosecution, it is compelling the defendant to incriminate himself but before a different forum. Regardless of the forum before which the incrimination is compelled, the nature of the activity is the same—compulsory self-incrimination by the United States.

Parenthetically, it should be noted that the evidence in question is *in custodia legis* and available to a state court only by order of the district court. 28 U.S.C. 1952 ed., Sec. 2463. The intervention of the district court by decree to supply the incriminating evidence to the state, would constitute action by the United States itself. *See Shelley v. Kraemer*, 334 U. S. 1.

Here, too, a federal officer initiated the prosecution and is the essential witness. Thus, the active participation of the Federal Government is an essentail ingredient of the state prosecution.

Petitioner submits that this compulsory self-incrimination by the National Government is prohibited because it constitutes an activity not within the enumerated powers of the Federal Government. In order to reduce the problem to its simplest terms, let us suppose that Congress would enact a statute providing that the Executive Department might compel evidence of crime from suspects, and supply the evidence thus obtained to state courts. The statute would further proyide absolute immunity from federal prosecution on account of any evidence thus brought to light. Possibly under *United States v. Murdock*, 284 U. S. 141, 149, such a law would not offend the Fifth Amendment "in that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination". Nevertheless, though compulsory self-incrimination in state courts

is not specifically forbidden to the central government, it is not expressly or impliedly granted either. Such a statute would certainly not be sanctioned by this Court.

A distinction must be made between a legitimate federal activity which has the incidental effect of incriminating one under state law, and federal activity that has the sole and only purpose of compulsory incrimination under state law. If the Government is engaged in a legitimate pursuit, such as tax collecting, it cannot be restricted by what another soverign might choose to do. See *Feldman v. United States*, 322 U. S. 487, 491. In such case, the validity of its action is justified by the fact it is performing a function entrusted to it by the Constitution.

This Court in *United States v. Murdock, supra*, was careful to make this distinction (p. 149):

> The plea [of Self-incrimination] does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution Art. VI, § 2.

In *Irvine v. California*, 347 U.S. 128, the use by a state court of a report of the petitioner's gambling activity made by him in purchasing a federal wagering stamp was upheld as not violating the Fifth Amendment. The justification was that the Federal Government was engaged in collecting a federal tax, the incrimination under state law.

being incidental. It could hardly be supposed that a federal law simply requiring all gamblers to make a report so that it could be turned over to the state, (without paying any tax and therefore not a revenue measure) would be upheld.

Save for the fact that the Congress has not by law authorized what the federal court, and federal agents, are about to do in the instant case, the circumstances are identical: the inferior officer of the district court, the United States Commissioner, in issuing the warrant, and the federal agent in executing it, were acting contrary to the Constitution. What they did can no more be justified than could a statute requiring all gamblers to file a report of the activities with the federal authorities (*without the payment of any tax.*) Hence, the subsequent incrimination through the use of federal powers is not incidental to the exercise of any constitutional power, but rather it is incidental to the exercise of an *unconstitutional* power. It should, therefore, be held that the activity of the Federal Government, through its judicial and executive branch, in incriminating a person under state law, is not a delegated constitutional power.

IV

If Any Conflict Exists Between a State Right to Obtain Evidence and an Individual Constitutional Right to Suppression, the Federal Right Must Prevail.

In the opinion of petitioner, the Court of Appeals misconstrued *Stefanelli v. Minard*, 342 U.S. 117, as controlling the disposition of the case at bar. The *Stefanelli* case held that a federal court, in the exercise of discretion, should refuse to enjoin state officials from using evidence, claimed to be unlawfully seized by the state, in a criminal trial.

The requested relief would have been an "active intrusion" into the state proceedings because the restraining hand of federal power would have been laid directly on state officials. At the policy level, it was said that the result of sanctioning such intervention would have been to "expose every state criminal prosecution to insupportable disruption."

Different considerations govern this case. Federal power is exerted solely on agents of the United States acting as such, not on state officials. The evidence in question is already in the custody of federal law and officials. The redress sought will not cause the federal judiciary to interfere with state officials, or with their use of evidence, but will simply preserve the *status quo*. If any interference could arise, of necesity it would be caused by an attempt of the state to seize control of what is in federal custody. For the state court to be unable to secure evidence under control of the Federal Government is no more an interference with the state prosecution than would be the refusal of the Federal Bureau of Investigation to produce confidential reports in answer to a subpoena *duces tecum* or the refusal of an F.B.I. agent to testify as to the contents of such a report, or as to the identity of an informant. See *United States ex rel. Touhy, v. Ragen, supra.*

When a state is denied the use of relevant evidence because it has been suppressed in federal court, this is no more of an interference with the state than when a federal court orders the property returned to the victim (no contraband being involved). In either case, it is unavailable for a state prosecution. If suppression alone constitutes interference with the state, so does a return, the sole distinction being that the victim does not ask for the evidence to be restored.

From what has been said, it follows either that a state

has no right to obtain evidence that the aggrieved person seeks to have returned or suppressed, or that the state could prevent a return by intervening. The later alternative means that the constitutional remedy of return and suppression is limited to those situations where a state government does not want to use the evidence in question. That a state government, rather than the victim, has a priority with respect to the use, or lack of use, and the possession of, illegally seized property, is patently absurd.

The distinction between the case at bar and *Stefanelli v. Minard*, *supra*, become apparent from those cases holding that, once a court of the United States acquires control of a *res*, it is beyond the reach of a state court. See *Covell v. Heyman*, 111 U.S. 176, in which property held by a United States Marshal under federal execution was declared to be beyond the reach of the state court. This Court there said (at p. 179):

> The point of the decision in *Freeman v. Howe*, *supra*, [24 How. 450,] is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction, of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; * * *

That the evidence in question is here in the custody of federal law, subject to orders of the district court, should dispose of the position of the Court of Appeals that the *Stefanelli* case "has force and applicability here".

V

There is no Warrant for Limiting the Previous Order of the Trial Court and the Language of Rule 41 of the Federal Criminal Rules to a Restriction on Using the Evidence in Federal District Court Alone.

The appelant had moved that the property seized "be suppressed as evidence against him *in any criminal proceeding* including the above entitled action". (R.3) The trial court granted the motion in the form in which made (R.4), and the Government moved to dismiss. (R. 4-5) At this point, unless the order suppressing the evidence were appealed by the United States, it became final. See *United States v. Cefaratti*, 91 U.S. App. D.C. 297, 302 F.Hd 13 certorari denied, 345 U.S. 997. As the United States did not appeal, the order granting the motion *in the terms in which it was made*, became *res judicata*, even if it *erroneously* prohibited the use of the evidence in a state criminal proceeding. See *Steel v. United States*,* No. 2, 267 U.S. 505, 507. The subsequent order of the trial court, to the extent that it was in conflict with the first order, is invalid.

The terms of the motion that was granted clearly contemplate a suppression in criminal proceedings other than, and in addition to, the narcotics case then pending, since the phrase employed is "including the above-entitled action". Had the petitioner intended to restrict the effect, he obviously would have said in plain English, "be suppressed as evidence against him in any criminal proceeding *in this court*, including the above entitled action." It is submitted that "*any* criminal proceeding" is sufficiently broad in scope to embrace a criminal action in any of the forty-eight states, or any federal court, or any military tribunal.

*"The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore *res judicata* as against him." **Steel v. United States No. 2, supra**, at p. 507.

Rule 41 (e) is equally comprehensive. It prohibits the use of the evidence "at any hearing or trial". While the meaning of this rule has not been judicially interpeted, this Court construed a similar phrase in a recent term of court. In *Adams v. Maryland*, 347 U.S. 179, the Supreme Court was called upon to decide whether a witness testifying before a congressional committee could have the evidence there given used by the State of Maryland in a criminal prosecution. Title 18, U.S.C. 3486, provided that no testimony given before a congressional committee "shall be used as evidence in any criminal proceeding against him in any court." There, as here, it was urged that "any criminal proceeding" and "any court" really meant only a *federal* court prosecution. This Court rejected the argument in these words:

> Nor can we hold that the Act bars use of committee testimony in United States courts but not in state courts. The Act forbids use of such evidence "in any criminal proceeding . . . in any court." Language could be no plainer. Even if there could be legislative history sufficiently strong to make "any court" mean United States courts only, there is no such history.

Mr. Justice Jackson, in his concurring opinion, was equally emphatic:

> The statute seems as unambiguous as language can be. If words mean anything, the statute extends its protection to all witnesses, to all testimony, and in all courts.

The fact that the Federal Rules of Criminal Proceedure "govern the proceedure in the courts of the United States * * * in all criminal proceedings", Rule 1, Federal Rules of Criminal Proceedure, does not *of itself* mean that the suppression is effective *only* in a federal criminal pro-

ceeding. Rule 41 (e) certainly has no requirement that a criminal proceeding be pending or contemplated. It is enough that the person have been aggrieved by an unlawful search and seizure in the district where the motion is brought. The note to subdivision (2) of the rule shows that the rule is a restatement of existing law and practice, with the exception of eliminating hearings before United States Commissioners. Existing practice permitted motions to return and suppress apart from a criminal proceeding. *Go-Bart Co. v. United States, supra*, 282 U.S. 344; *Burdeau v. McDowell, supra*. In *United States v. Wallace Co., supra*, it was conceeded that an order of suppression *could* extend beyond a criminal trial, and bar use of the evidence civilly. Therefore, Rule 1 does not restrict the scope of a suppression under Rule 41 (e) to a federal criminal proceeding.

CONCLUSION

The judgement of the Court of Appeals is in error and should be reversed and in the case remanded with directions to grant the motion of the petitioner.

Respectfully submitted,

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